REMARKS

The Applicants request reconsideration of the rejection.

Claims 1, 4-8 and 10-15 remain pending.

Claims 1, 4-5, 8, 10 and 12 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Badamo et al., U.S. Patent Publication No. 2002,/0181476 (Badamo) in view of Fukumoto et al., U.S. Patent Publication No. 2003/0012139 (Fukumoto) and Gilbert et al., U.S. Patent No. 6,771,595 (Gilbert). The Applicants traverse these rejections as follows.

In the Reply filed August 29, 2008, the Applicants pointed out that neither Badamo nor Fukumoto mentioned the selection of an extension function processor based on a predicted number of packets. The Applicants further asserted that Badamo discloses no structure corresponding to the claimed statistic information collecting processor, and no suggestion to select a functional unit for load balancing, (or, in terms of claim 1, to select a service card to which packets are transmitted, on the basis of the amount of packets predicted from header information and the amount of packets which have been analyzed). In addition, the Applicants noted that Fukumoto neither discloses nor suggests to select anything in the manner of selecting an extension function processor as claimed. Finally, the Applicants noted that Gilbert is applied so broadly in the rejection that it appears that only hindsight reasoning could prompt one of ordinary skill in the art to consider Gilbert a suitable reference to combine with Badamo and Fukumoto, and that Gilbert does not select a functional unit for processing as in the manner of the claimed selection of an extension function processor. In summary, then, the Applicants have argued that none of Badamo, Fukumoto and Gilbert, whether taken individually or in

combination, discloses selection of an extension function processor based on a predicted amount of packets received by the line cards, and that there is no motivation to combine the non-analogous art of Gilbert with Badamo and Fukumoto in any event.

In partial response to these arguments, the Examiner has asserted the case of *In re Oetiker*, 977 F2d , 24 USPQ 2d 1443 (Fed. Cir. 1992) for the proposition that the prior art reference must be in the field of Applicants' endeavor or, if not, then be reasonably pertinent problem with which the Applicants are concerned, in order to be relied upon as a basis for rejection of the claimed invention. The Examiner thus considers Gilbert to be a proper reference to combine with Badamo and Fukumoto.

However, what the Office Action fails to mention is that, in the holding of *In re Oetiker*, the court found insufficient the evidence that a person working on hose clamps would have been motivated to consider fasteners used in clothing. *Oetiker*, 977 F2d at 1447. Thus, *Oetiker* should not be cited for its expression of presumed boilerplate law without applying the law <u>as applied by the court expressing it</u>, before applying the law to the present case.

In addition, it has been held that, in judging whether a claimed invention would have been obvious, it is important to avoid the use of hindsight because after an invention has been made, it seems easy to assert its obviousness. *In re Para-Ordinance Manufacturing Inc. v SGS Importers International Inc.*, 73 F3d 1085, 1087 (Fed. Cir. 1995); *In re Fine*, 1037 F2d 1071, 1075 (Fed. Cir. 1988). Obviousness must be judged from the perspective of one in ordinary in the art at the time the invention was made, and cannot be proved by simply searching the prior art, using the claim itself as a guide, until all of the elements of the invention have been found.

In re Gorman, 933 F2d 982, 987 (Fed. Cir. 1991). There must be something, either in the references themselves or in the general knowledge of the person of ordinary skill in the art, that would have led such a person to combine the references in the manner claimed, and with a reasonable expectation of success. *In re Jones*, 958 F2d 347, 351 (Fed. Cir. 1992); *In re Dow Chemical Co.*, 837 F2d 469-473 (Fed Cir 1988). (Summary from Alan L. Durham, Patent Law Essentials (1999) , p. 100).

In the present case, Gilbert is directed to network control wherein future traffic patterns are predicted based on number of packets received and transmitted. However, Gilbert discloses a resource control that adds and removes memory as needed, and does not select a functional unit for processing as in the manner of the claimed selection of an extension function processor. Moreover, Badamo's paragraph [0047] suggests that modification of the processing load is based on the service card's own determination of throughput, without consideration of the throughput of any other service card. Such is not truly a load balancing, and therefore to modify Badamo according to Gilbert, based on the amount of traffic and prediction of future traffic, would alter the purpose of Badamo.

Additionally, Gilbert changes the memory allocation without consideration of load balancing or throughput, so if one were to modify Badamo according to Gilbert, one would utilize future prediction to change the memory allocation of the Badamo system according to Gilbert, and would not determine where to send packets for load balancing because Gilbert does not consider load balancing. Of course, there is no selection of an external function processor as claimed, and thus any combination would nevertheless fail to reach the claimed invention.

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In accordance with the foregoing, the Applicants again respectfully submit that there is no motivation, whether in the teachings of the references themselves or within the common sense or general knowledge of the person of ordinary skill, that would suggest the combination of Gilbert with Badamo and Fukumoto to render obvious the invention claimed in the independent claims.

Nevertheless, the Applicants have noted the Examiner's comment, on page 2 of the Office Action, that the independent claims 1 and 12 do not mention what exactly the "extension function processors" perform besides "on basis of said amount of packets predicted, an extension function processor to which the packets are transmitted is selected from the extension function processors." Accordingly, to advance the prosecution of the present application, the Applicants have amended independent claim 1 to recite that, on the basis of the predicted amount of packets received by all of the line cards, an extension function processor to which the packets are transmitted is selected from the extension function processors and implements processing on the packets so as to allocate to each extension function processor uniformly an amount of traffic that is processed in each extension function processor. Accordingly, the patentable distinction of claim 1 is strengthened and clarified.

Similarly, independent claim 12 has been amended to recite the step of selecting, from the extension function processors, an extension function processor to which the received packet is transmitted on the basis of the predicted number of packets, the selected extension function processor implementing processing on said packets so as to allocate to each extension function processor uniformly an amount of traffic that is processed in each extension function processor. Claim 12 is thus

clearly distinguishable from the combination of Badamo, Fukumoto and Gilbert, however motivated.

     In view of the foregoing amendments and remarks, the Applicants request reconsideration of the rejection and allowance of the claims.

     To the extent necessary, Applicants petition for an extension of time under 37 CFR 1.136. Please charge any shortage in fees due in connection with the filing of this paper, including extension of time fees, or credit any overpayment of fees, to the deposit account of Brundidge & Stanger, P.C., Deposit Account No. 50-4888 (referencing attorney docket no. H-1100).

               Respectfully submitted,

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